(Stephen J. Patsfall 0012271)
Attorney for Defendant Condon

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

RONALD MELTON, et al.,	:	**Case No. C-1-01-528**
Plaintiffs,	:	
v.	:	**(Spiegel, J.)**
Board of County Commissioners of Hamilton County, Ohio., et al.,	:	
Defendants.	:	

DEFENDANT THOMAS CONDON'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR VOLUNTARY DISMISSAL

Plaintiffs' motion for voluntary dismissal should be denied as they have failed to articulate a valid reason for the voluntary dismissal and granting the motion would be prejudicial to defendant Thomas Condon.

Fed. R. Civ. P. 41(a)(2) provides: ". . . an action shall not be dismissed at the plaintiffs' instance save upon order of the court and upon such terms and conditions as the court deems proper." Under this rule, the trial court must consider the interest of the defendant in determining whether to allow the voluntary dismissal. "Whether to grant a dismissal pursuant to Rule 41(a)(2) is a matter within the sound discretion of the District Court." Garner v. Missouri-Pacific Lines, 409, 2d. 6, 7 (Sixth Cir. 1969).

The Sixth Circuit has identified four factors to consider to determine whether a court should grant a voluntary dismissal. In Gover v. Eli Lilly & Co. , 33 F. 3d. 716, 718 (Sixth Cir. 1994) the court stated that the factors for a court to consider to determine if the defendant will suffer plain legal prejudice are: "the defendants' effort and expense of preparing for trial, excessive delay and lack of diligence on the part of the plaintiff in prosecuting the action, insufficient explanation for the need to take a dismissal and whether a motion for summary judgment has been filed by defendant".

The plaintiffs' motion should be denied as all four factors are implicated in this case. As the Court is aware, extensive (and expensive) discovery has taken place in this case, a trial date is set, numerous motions for summary judgment have been filed, and this case has gone on for three years! There is no good reason why plaintiffs cannot proceed.

The plaintiffs have failed to prosecute the action in a timely manner. Ten days prior to the discovery cut-off established by this court, the plaintiffs attempted to consolidate the action with another pending action. This was after they had opposed a motion to consolidate filed over a year earlier. However, additional discovery did not produce anything that should cause the plaintiffs to believe that the cases should have been consolidated. The motion only served to have the defendants reply to another motion and take time away from the preparation of the case for trial.

The plaintiffs have not articulated any valid reason whatsoever for why the case should be dismissed without prejudice. They simply assert that the defendants would not agree to a stipulation to dismiss the case without prejudice and therefore have made application to the court. A dismissal would not promote judicial economy and only serves to delay the proceedings in this matter even further.

Other District and Circuit courts have either denied or upheld the denial of motions to voluntarily dismiss without prejudice under facts less egregious than the case at bar. In Pezold Air Charters v. Phoenix Corp. (2000, MD Fla.) 192 FRD 721; 2000 U.S. Dist. Lexis 7405, the court denied the plaintiff's motion to dismiss without prejudice after recognizing the factors set forth by the Sixth Circuit. The court noted that the parties had expended significant resources in resolving a motion for summary judgment. It also noted that the trial was less than four months away and that the plaintiff did not offer any reason to justify voluntarily dismissing the case. The Fifth Circuit, in Hartford Accident & Indem Co., 903 F. 2d. at 361, upheld the District Court' s decision to deny the motion for voluntary dismissal without prejudice because the case had been removed to Federal Court for nearly 10 months, hearings had been conducted on various issues and significant discovery had been undertaken. The court noted that the defendants had expended significant time and effort in litigating the case and that the plaintiff was not prompt in seeking a dismissal. The Tenth Circuit reached a similar decision in Shaffer v. Evans 263 F. 2d. 134 (Tenth Cir. 1958). In affirming the decision of the District Court which denied the motion for voluntary dismissal without prejudice, the court noted that the action had been pending for six months at the time of the hearing, depositions had been taken and a pretrial conference had been held. The case had not been scheduled for trial but was ready to be tried at the next jury term.

If this Court is inclined to allow the plaintiffs to voluntarily dismiss the case without prejudice, it would be proper for the court to condition the voluntary dismissal upon reimbursement to defendants the costs and attorneys' fees expended for preparing the case for trial. The Sixth Circuit recognized in Smoot v. Fox, 353 F. 2d. 830, 833 (Sixth Cir. 1965) that a court may, in its discretion, award attorneys fees against the dismissing party.

CONCLUSION:

The plaintiffs have not articulated any reasonable basis for seeking the voluntary dismissal without prejudice. Additionally, they waited to file the voluntary dismissal motion until after defendants filed their motions for summary judgment. The case has been pending for three years and dismissing the case now a month and a half before trial would unduly prejudice defendants who have motions for summary judgment pending before the court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of May, 2004 the foregoing was filed electronically with the Clerk of Court using the CM/ECFF system which will send notification to the following: David W. Kapor, Esq., and Michael B. Ganson, Esq., **Attorneys for Plaintiffs,** Lawrence E. Barbiere, Esq., **Attorney for Defendant Parrott,** Glenn V. Whitaker, Esq., **Attorney for Defendant Tobias,** Louis F. Gilligan, Esq. and Jamie M. Ramsey, Esq., **Attorneys for Hamilton County,**

/s/ Stephen J. Patsfall
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